

WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES FEBRUARY, 2011

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Grant
Juneau
Milwaukee
Washington
Oneida

TUESDAY, FEBRUARY 1, 2011

9:45 a.m. 08AP2765-CR State v. David D. Funk
10:45 a.m. 09AP1252-CR State v. Shantell T. Harbor

WEDNESDAY, FEBRUARY 2, 2011

9:45 a.m. 09AP956-CR State v. Donovan M. Burris
10:45 a.m. 09AP1714 Emjay Investment Company v. Village of Germantown
1:30 p.m. 09AP775 E-Z Roll Off, LLC v. County of Oneida

THURSDAY, FEBRUARY 3, 2011

9:45 a.m. 09AP25-CR State v. Olu A. Rhodes
10:45 a.m. 07AP203 Michael S. Polsky v. Daniel E. Virnich
1:30 p.m. 09AP996-D Office of Lawyer Regulation v. Alvin H. Eisenberg

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 1, 2011
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Juneau County Circuit Court decision, Judge John P. Roemer, Jr., presiding.

2008AP2765-CR

State v. Funk

In this child sexual assault case, the Supreme Court examines the method by which a court determines potential juror bias.

Some background: A jury convicted David D. Funk on two counts of sexually assaulting a 10-year-old girl. Three days before his scheduled sentencing, the defense filed a motion to vacate the judgment and for a new trial. The motion was based on the discovery that a 20-year-old female juror and her sisters had been sexually assaulted by a school bus driver when they were children and that she had failed to disclose this information during voir dire.

After the motion was filed, the trial court disclosed to the prosecutor and defense counsel that the juror had also been the victim of a sexual assault in 2005, when she was 17 years old. During that prosecution, the now-juror had testified against her assailant at a preliminary hearing. The man accused in that case eventually pleaded no contest to a charge of third-degree sexual assault.

During voir dire, the trial court told prospective jurors that they could expect to be asked by attorneys if they had been victims of sexual assault or if their friends, neighbors or relatives had been sexually assaulted. However, neither the trial court nor either of the attorneys ever followed up and directly asked whether any prospective juror had been the victim of a sexual assault. Defense counsel asked, among other things, if anyone had ever gone to court to testify in either a criminal or civil case. In response to these questions, several jurors relayed various experiences they had had with the justice system.

An evidentiary hearing on the defense motion focused on whether the juror had erroneously or incompletely responded to a material question posed by the trial court during voir dire. The trial court found that the juror had incorrectly responded to a material question by defense counsel and ultimately concluded that she was biased. The question the court identified as being incorrectly answered was if anyone had testified in a criminal case as a witness, which she had.

The state appealed. The Court of Appeals affirmed, noting that in order to obtain a new trial based on a juror's lack of candor, a litigant must show that the juror incorrectly or incompletely responded to a material question on voir dire and that it is more probable than not that under the facts and circumstances of the particular case the juror was biased against the moving party. State v. Wyss, 124 Wis. 2d 681, 726, 370 N.W.2d 745 (1985), overruled on other grounds by State v. Poellinger, 153 Wis. 2d 493, 504-05, 451 N.W.2d 752 (1990).

The Court of Appeals said once it has been established that a juror gave an incorrect or incomplete response to any material question, the moving party must be afforded the opportunity to establish bias.

The state argued on appeal the defendant's motion had focused on whether she had failed to answer a question about whether she had ever been the victim of a sexual assault, and no one asked her at the motion hearing why she had not raised her hand in response to the question about prior testimony.

WISCONSIN SUPREME COURT
TUESDAY, FEBRUARY 1, 2011
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Dennis P. Moroney, presiding.

2009AP1252

[State v. Harbor](#)

In this case, the Supreme Court examines the circumstances under which a court may modify a sentence because of a “new factor,” and whether a defendant was denied effective assistance of counsel because her lawyer failed to present or investigate pertinent sentencing factors.

Some background: Shantell Harbor was convicted of one count of attempted robbery, one count of attempted armed robbery, and one count of armed robbery, all with threat of force.

Without having a pre-sentence investigation report conducted, Harbor was sentenced to 12 years initial confinement and 12 years extended supervision. At sentencing, defense counsel addressed Harbor’s age, her status as a mother, her graduation from high school and brief employment history. Counsel informed the court that beginning in late 2006 and early 2007, Harbor was suffering from bipolar disorder and a fairly severe depression.

The circuit court stated the purpose of its sentence was to protect the public and to punish Harbor. The court noted that it was not aware of the exact nature of Harbor’s mental health problems. The court also considered guidelines and concluded the offense was aggravated because it was not motivated by basic necessities, but by greed.

Harbor filed a post-conviction motion, requesting her sentence to be modified based upon information post-conviction counsel had obtained as a result of a post-sentence investigation. Harbor also requested new sentencing based upon ineffective assistance of counsel for failing to investigate and present mitigating factors at sentencing.

The post-sentencing report included information about Harbor’s background, indicating she was sexually assaulted as a child and was born “the child of a child” to a 16-year-old mother who had addiction issues and had been the victim of physical abuse.

The court said given Harbor’s past criminal history, the nature and seriousness of the current offense while committed on supervision, and the risk of harm presented to the community, the sentence was warranted. Therefore, the circuit court did not conclude that counsel had been ineffective, because it was not persuaded Harbor was prejudiced due to the absence of a presentence report.

The Court of Appeals affirmed, observing that the information in the post-sentencing investigation shed light on difficulties Harbor faced in the past, as well as currently, but did not address the circuit court’s overriding concern of protection of the public. The Court of Appeals concluded that because the circuit court’s primary concern was protection of the public, the report received after sentencing failed to show information highly relevant to the imposition of the original sentence. Accordingly, the Court of Appeals concluded Harbor was not entitled to sentence modification based on a new factor.

Harbor asks the Supreme Court to review if a post-sentencing report that presented previously unknown information about her mental health status, her addiction issues, and her traumatic upbringing, constitute a new factor justifying sentence modification. She contends she was denied effective assistance of counsel at her sentence hearing because her counsel failed to investigate or present any mitigating factors, such as her mental health status, her addiction issues, and her traumatic upbringing.

**WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 2, 2011
9:45 a.m.**

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judges William Sosnay and Dennis R. Cimpl, presiding.

2009AP956-CR

[State v. Burris](#)

In this criminal case, the Supreme Court examines the deference to be given to a circuit court's discretionary use of jury instructions based on Supreme Court opinions.

Some background: A jury convicted Donovan M. Burris of first-degree recklessly causing bodily injury and of being a felon in possession of a firearm for shooting Kamal Rashada in Milwaukee on Sept. 5, 2007. Kamal is the brother of Khadijah Rashada, Burris's ex-girlfriend, and the mother of Burris's two children.

Burris was at the Rashada home when an argument erupted between Khadijah and Burris that stemmed, in part, from a disagreement about who was going to provide diapers for the children and about Khadijah's new boyfriend.

According to Khadijah, her mother, Cathy Rashada, came into the room where the argument was occurring and led her daughter and grandchildren to the living room. Burris followed them to the living room, and the argument continued. Khadijah testified that, at one point, Burris pulled out a handgun from the waistband of his pants, pointed the gun at her, and said, "Bitch, I kill you." According to Khadijah, at that time, her brother Kamal intervened, opened the front door and told Burris to leave. Khadijah stated that Burris refused, placed the muzzle of the gun close to Kamal's neck, and fired the gun, hitting Kamal in the neck. She further testified that after the shooting, Burris said that he had not meant to do it, implored Kamal not to die, aimed the gun at his own head, and told Cathy Rashada to kill him. Cathy and Kamal also testified that after the shooting Burris tried to determine if Kamal would be okay and said that he had not meant to do it.

Burris testified that he walked toward the front door with the gun pointed down at his side. He stated that Kamal came up to him quickly and reached for his wrist. Burris asserted that as he pulled his arm away from Kamal's grasp, the pressure from his hand hit the trigger and it discharged. He also testified that after the shooting he had checked on Kamal's gunshot wound to determine that it was not life-threatening.

The dispute at trial centered on whether Burris had exhibited "utter disregard for human life" (first-degree recklessly causing bodily injury), whether he had simply recklessly caused bodily injury (second-degree recklessly causing bodily injury), or whether the shooting had been accidental (not guilty).

After deliberating a while, the jury sent a written question to the judge asking whether it could consider facts and circumstances after the shooting. The state agreed that the court should give a supplemental instruction proposed by the judge. Defense counsel, however, objected, arguing that the court should simply instruct the jurors to go over the original instructions again. The judge provided a supplemental instruction that quoted language from State v. Jensen, 2000 WI 84, ¶32, 236 Wis. 2d 521, 613 N.W.2d 170.

The Court of Appeals' decision addressed Burris's argument that the circuit court had erred in giving an instruction that had misled the jury. The Court of Appeals noted the distinction

between a claim that a challenged jury instruction was an inaccurate statement of the law and a claim that an instruction, while legally accurate, misled the jury.

Over a dissent by Judge Ralph Adam Fine, the Court of Appeals agreed with Burris that in the present case the correct answer to the jury's question was simply "yes," that it could consider facts and circumstances after the shooting. It concluded that the circuit court's supplemental instruction had misled the jury. It therefore reversed Burris's conviction and remanded the case to the trial court for additional proceedings.

The state asked the Supreme Court to review two issues: whether the jury instruction quoting a Supreme Court decision was erroneous, and if the Court of Appeals applied the proper standard of review given the circumstances of this case.

**WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 2, 2011
10:45 a.m.**

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Washington County Circuit Court decision, Judge David C. Resheske, presiding.

2009AP1714 [Emjay Inv. Co. v. Village of Germantown](#)

In this case, the Supreme Court examines the special assessment process and the application of the 90-day statute of limitations on appeals under § 66.0703(12)(a).

Some background: Emjay owns land in the village of Germantown on the corner of Appleton Avenue and County Line Road, where it operates a restaurant that has been in business for 60 years. Menards sought to build a retail development nearby, and Emjay contends the scope of the improvements proposed by Menards became the outline of the properties to be specially assessed, and was based on a mistaken proposed site plan prepared by Menards' planning and development department.

On May 17, 2004, the village held a properly noticed hearing on the special assessments and adopted a resolution levying those assessments on June 21, 2004. The resolution was published on June 30, 2004. A notice of the adoption of the resolution was sent to all interested parties, including Emjay, on July 12, 2004. The notice said the special assessments would be deferred until the property was commercially developed or redeveloped before 2012. Emjay does not dispute that it received this notice. In September 2007, Emjay contracted to sell its property to a developer. Prior to the closing, it was determined that Emjay owed the special assessments.

On May 30, 2008, Emjay filed a notice of appeal and complaint under Wis. Stat. § 66.0703(12) (2007-08), challenging the legality of the notice/resolution and special assessment, and seeking various forms of relief. Emjay argued the confusion generated by the village's notice rendered the statute of limitation in § 66.0703(12)(a) inapplicable.

The village moved to dismiss the appeal and complaint, and the circuit court granted the motion. Emjay filed this suit in circuit court, which concluded the action was barred by the statute of limitations. Emjay appealed and the Court of Appeals affirmed.

Emjay presents three issues for Supreme Court review: (1) Wis. Stat. Ch. 66 does not permit a "contingent" special assessment, rendering the 90-day limitation inapplicable; (2) the Village never adopted a final resolution in compliance with § 66.0703(8)(c), so the 90-day limitation does not apply; and (3) Emjay may challenge the special assessment by means not barred by the 90-day limitation.

Emjay asserts that because of the contingent nature of the special assessment, the village's notice and resolution failed to apprise him the assessment adversely affected its property, thereby failing to trigger § 66.0703(12)'s 90-day limitation. Emjay claims the lack of reasonable notice and the deprivation of the full proceeds of the sale his property raise issues of due process.

**WISCONSIN SUPREME COURT
WEDNESDAY, FEBRUARY 2, 2011
1:30 p.m.**

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed an Oneida County Circuit Court decision, Judge Patrick F. O'Melia, presiding.

2009AP775

E-Z Roll Off v. County of Oneida

This case involves allegations that Oneida County helped a waste-hauling company engage in monopolistic behavior by selectively charging reduced dumping fees at a county-run landfill. The Supreme Court is asked to examine the notice requirements of Wis. Stat. § 893.80(1) for filing claims against a county.

Some background: E-Z Roll Off was in the solid waste hauling business, providing dumpsters to its customers. In June of 2003, Oneida County executed an agreement with another waste hauling company, Waste Management, Wisconsin, Inc. As part of that agreement, Waste Management was charged a preferential \$5.25 per ton rate for waste it delivered to the county's transfer station. Other waste haulers, including E-Z Roll Off, were charged \$44.00 or \$54.00 per ton, depending on whether the hauler delivered enough waste to the county annually to earn a rebate.

E-Z Roll Off's owners were unaware of the Waste Management contract until February of 2004 when one of their employees inadvertently saw a scale ticket showing Waste Management's rate. E-Z Roll Off's owners requested a meeting with the county's solid waste director. At the meeting, the owners expressed concern with the Waste Management contract, saying it created a monopoly and that they would take their waste elsewhere unless the county reduced E-Z Roll Off's disposal rate. The county's solid waste director refused to reduce the rate.

E-Z Roll Off's owners then filed complaints with various governmental entities, including the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP). E-Z Roll Off requested reimbursement of the amount paid over \$5.25 per ton, which was about \$98,000, and asked that the monopoly be broken and criminal charges be filed against the parties involved. DATCP forwarded a copy of the complaint to the Oneida County landfill but took no further action. DATCP's cover letter indicated the county had the option to provide a response, which DATCP would place in its file. The county's solid waste director replied to the complaint in a letter sent to DATCP and E-Z Roll Off. The solid waste director asserted that E-Z Roll Off's owners were always aware of the contract terms and stressed that the contract had resulted from an open bidding process.

On Sept. 28, 2005, E-Z Roll Off filed with the county a notice of injury alleging violations of ch. 133, Stats., and a statement of claim indicating a loss of over \$1 million in past and future lost earnings. The claim was disallowed. E-Z Roll Off filed suit in April of 2006.

The circuit court ultimately granted the county's motion for summary judgment, dismissing the case. The circuit court concluded that the notice requirements of § 893.80(1) applied. The circuit court held that E-Z Roll Off did not allege a continuing violation but rather alleged that the agreement between the county and Waste Management signed in June of 2003 was illegal. The circuit court said the action began to accrue in June of 2003 and that E-Z Roll Off was required to file a notice of claim within 120 days. The circuit court said E-Z Roll Off filed its notice of claim in September of 2005, over two years later. Accordingly, the circuit court concluded the claim was not filed timely.

E-Z Roll Off appealed, and the Court of Appeals reversed and remanded. The Court of Appeals said whether the notice provision of § 893.80(1) applies to specific statutory actions is a question of statutory interpretation. The Court of Appeals noted that E-Z Roll Off argued for an exception to the notice requirements for its ch. 133 antitrust claim. The Court of Appeals said the primary focus in that regard was on § 133.16, injunction, pleading, and practice. The Court of Appeals went on to note that the notice of claim is not subject to any filing deadline.

Oneida County asks the Supreme Court to review the following issues:

- Do the notice requirements mandated by Wis. Stat. §893.80(1) and §59.07 apply to Plaintiff-Respondent E-Z Roll Off LLC's action for declaratory relief under Wis. Stat. §133.03 and damages alleged under Wis. Stat. §133.18?
- Was the Notice of Injury timely?
- Did Oneida County have actual notice of the injury and was it prejudiced because it was not timely served with the Notice of Injury?
- Does the continuing violations doctrine apply to Wis. Stat. §893.80(1)?

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 3, 2011
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Patricia D. McMahon, presiding.

2009AP25-CR

[State v. Rhodes](#)

In this homicide case, the Supreme Court examines the constitutional principles governing confrontation and compulsory process in limiting cross-examination of a witness.

Some background: The defendant Olu A. Rhodes and his brother, Jelani Saleem, were tried together for the shooting death of Robert Davis and the shooting injury of Jonte Watt. The state's theory of the case was that the brothers had killed Davis because they thought he was responsible for arranging to have their sister, Nari Rhodes, beaten, and that Watt was simply an unlucky bystander. Watt and his girlfriend were with Davis at the time of the shooting and both identified the brothers as the shooters.

During Nari's cross examination by defense counsel, counsel began to ask about previous occasions when Davis had beaten her. After a sidebar, the circuit court refused to allow defense counsel to ask Nari any more questions about earlier beatings by Davis.

Defense counsel had told the court he was not going to ask about every time Davis had hurt Nari but wanted to focus on one serious incident where Davis broke Nari's orbital bone. Counsel explained the purpose of the questioning would be to try to rebut the state's motive argument. Counsel said he would have asked Nari if she had made her brothers aware of the earlier injury and who inflicted it and she would have said yes. Counsel said he would then have asked Nari if her brothers retaliated after the incident and she would have replied that there was no response from her brothers.

The jury acquitted Saleem of both charges. Rhodes appealed, and the Court of Appeals reversed and remanded.

The Court of Appeals noted that a circuit court's decision to admit or exclude evidence is discretionary and will not be reversed, provided the decision was made in accordance with accepted legal standards and the facts of record. State v. Pharr, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). The court also noted that a defendant's right to confront the witnesses against him is central to the truth-finding function of a criminal trial, and a defendant's right to cross examine is an essential and fundamental requirement.

The state asks the Supreme Court to review the following issues:

- Did the Court of Appeals correctly apply the constitutional principles of law governing confrontation and compulsory process when it concluded that the circuit court impermissibly limited Olu A. Rhodes' cross-examination of a state witness, Nari Rhodes?
- If the answer to the foregoing question is "yes," was the circuit court's error harmless?

**WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 3, 2011
10:45 a.m.**

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Grant County Circuit Court decision, Judge Michael Kirchman, presiding.

2007AP203

Polsky v. Virnich

In this case, the Supreme Court examines issues arising from a dispute over the fiduciary duties of two corporate officers accused by a court-appointed receiver of taking excessive compensation and engaging in transactions benefitting themselves personally at the corporation's expense.

Some background: In June 2003, after Communications Products Corporation defaulted on a loan, its largest creditor, American Trust and Savings Bank alleged the corporation was insolvent and petitioned for a receivership. The court appointed a receiver for the corporation, Michael S. Polsky, who brought this action in May 2004 on the corporation's behalf. He alleged that for years, Daniel E. Virnich and Jack M. Moores breached their fiduciary duties to the corporation by taking excessive compensation and engaging in transactions benefitting themselves personally at the corporation's expense.

Virnich and Moores moved to dismiss the receiver's complaint arguing, among other things, that the receiver's claims were barred by Beloit Liquidating Trust v. Grade, 2004 WI 39, 270 Wis. 2d 356, 677 N.W.2d 298. Polsky objected, contending that while Beloit Liquidating may bar creditors' claims on their own behalf, it does not apply to a receiver's claims on behalf of the corporation itself. The circuit court agreed with the receiver and denied the motion.

At trial, the jury heard evidence that from 1990-2003, Virnich and Moores used a combination of salaries, management fees, "loans," dividends, and excessive lease rates to extract more than \$10 million from the corporation. Beginning in 2001, Communications Products experienced cash flow problems, then a period of acute financial distress, culminating in the loan default and the receivership. The jury awarded judgment in favor of the corporation totaling \$6.5 million, including \$3.8 million on breach of fiduciary duty claims and \$2.7 million on a conspiracy claim.

Virnich and Moores appealed. The Court of Appeals certified, and the Supreme Court accepted certification. On July 7, 2009, however, this court vacated the certification, noting a three/three split, and remanded to the Court of Appeals.

On remand, the court of appeals reversed. It said Beloit Liquidating Trust ruled that corporate officers did not owe fiduciary duties to creditors until: (1) the corporation became insolvent and (2) was not longer a "going concern." Here, there was no dispute that at the time of Virnich and Moores' alleged misconduct, Communications Products was a going concern. Therefore, the court of appeals concluded, "under Beloit Liquidating, any claim for a breach of fiduciary duty *to creditors* is barred."

Polsky asks the Supreme Court to review four issues:

- Whether the holding of Beloit Liquidating prohibits receivers from asserting claims, on the corporation's behalf, of breach of fiduciary duty to the corporation;

- Whether officers and directors, who self-deal against the corporation's interests "enjoy a unity of interest" with the corporation, mandating application of the intracorporate conspiracy doctrine;
- Without an underlying actionable violation of an independent right, is a conspiracy claim actionable?
- Whether a corporation's tort claim accrues before the claim is capable of enforcement when the tortfeasors are the only individuals who can enable the corporation to assert the claim.

WISCONSIN SUPREME COURT
THURSDAY, FEBRUARY 3, 2011
1:30 p.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case has a practice in Milwaukee.

2009AP996-D Office of Lawyer Regulation v. Alvin H. Eisenberg

In this case, Atty. Alvin H. Eisenberg has appealed the referee's recommendation that he be publicly reprimanded for three counts of professional misconduct.

Eisenberg, who was first licensed to practice law in 1958, specializes in representing personal injury clients. The misconduct alleged in the OLR's complaint arose out of the contentious dissolution of Eisenberg's partnership with Atty. Joseph Weigel. Pursuant to a stock redemption agreement entered into in March of 1999, the firm of Eisenberg, Weigel, Carlson, Blau & Clemens, S.C. redeemed all shares owned by Eisenberg. The firm agreed to employ Eisenberg on a month to month basis, with the right to terminate his employment on 30 days notice. The firm's employment agreement with Eisenberg contained a covenant against competition which prohibited Eisenberg from practicing law in the greater Milwaukee area for a period of six months after leaving the firm's employ. Wisconsin's rules of professional responsibility for attorneys prohibit such covenants.

On Jan. 23, 2006, without giving Eisenberg prior notice, the firm moved its offices. When Eisenberg arrived at the office the next morning there was nothing there except a few desks that were too large to move, which had been smashed. The phones had been disconnected, and the old phone number was transferred to the firm's new location. For a number of months after the move, the firm caused a truck with a sign mounted on both sides to be parked on a public street near the old office location. The sign on the truck indicated that the firm had moved and gave the new address. The firm continued to use Eisenberg's name despite repeated requests that it stop doing so. The firm subsequently hired an attorney named Donald Eisenberg. Alvin Eisenberg contends that the only reason the firm hired Donald Eisenberg was to mislead clients that Alvin Eisenberg was still employed there.

In mid-February 2006 Eisenberg created a new law firm of "Alvin H. Eisenberg, S.C." In March 2006 he began to circulate an advertising flyer to solicit business for the new firm. The flyer described Eisenberg's new firm as "Wisconsin's Premier Injury Firm Since 1958." The flyer did not contain the word "advertisement" and Eisenberg did not file the flyer with the OLR within five days of its dissemination, as required by the rules of professional responsibility.

The OLR's complaint alleged that Eisenberg engaged in misconduct by entering into the employment agreement that contained a non-compete covenant, by circulating an advertising flyer that described Eisenberg's new firm as "Wisconsin's Premier Injury Firm Since 1958" when in fact the new firm came into existence in 2006, and by circulating an advertising flyer that did not contain the word "advertisement."

The referee found that the OLR met its burden of proof as to all three counts of misconduct. The referee recommended that Eisenberg be publicly reprimanded, that he be ordered to complete 15 hours of CLE ethics credits over the next two years, and that he be

required to pay the costs of the proceeding. Eisenberg does not challenge the referee's conclusion that he engaged in misconduct but he argues that a public reprimand is too severe. He asserts that at most a private reprimand should be imposed.

The Supreme Court is expected to decide the appropriate sanction for Eisenberg's conduct.